Finding Safe Harbor: Clarifying the Limited Application of Section 144

2008

Section 144 of the General Corporation Law of the State of Delaware was adopted for a limited purpose: to rescue certain transactions, those in which the directors and officers of a corporation have an interest, from per se voidability under the common law. That is all. Under its plain language, section 144 plays no part in validating transactions or in ensuring the business judgment rule's application. Over time, however, practitioners and courts have suggested a broader role for section 144, linking the statute to the common-law analysis of interested transactions. This article reviews the history of section 144, the language of the statute, and evidence of its overextension in judicial opinions, closing with a possible statutory revision to make clear the original intent of section 144's drafters.

Ultimately, this article attempts to clarify section 144's limited role and application by distinguishing the analysis under section 144 from the analysis under the courts' common-law fiduciary analysis. Every interested transaction is subject to review under the common law of breach of fiduciary duty. Section 144 merely determines whether the interested transaction will also be subject to the common law of voidability. Conflicts between judicial glosses on section 144 and the text of the statute itself suggest that practitioners should be aware of these principles and recognize that section 144 may provide less protection than they think it does.

Related Files
  - Read the full article from Delaware Journal of Corporate Law

Related Lawyers
  - Blake Rohrbacher
  - John Mark Zeberkiewicz

Related Practices
  - Chancery / Corporate Litigation
  - Corporate Advisory and Governance